Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1332

THEMIS N. ANASTOS and HUGH M. MATCHETT,

Petitioners,

and

WILLIAM V. DEMAIO, M.J.D.M. TRUCK RENTALS, INC., a Pennsylvania corporation,

Use-Petitioners,

vs.

EILEEN M. O'BRIEN, as Executrix of the Estate of WILLIAM J. O'BRIEN, JR., Deceased,

Respondent.

THEMIS N. ANASTOS and HUGH M. MATCHETT,

Petitioners,

vs.

WILLIAM V. DEMAIO, M.J.D.M. TRUCK RENTALS, INC., a Pennsylvania corporation, and EILEEN M. O'BRIEN, as Executrix of the Estate of WILLIAM J. O'BRIEN, JR., Deceased,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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I The State of Illinois, by the action of the Supreme Court of Illinois in denying a petition for appeal as a matter of right from a purported judgment of the Appellate Court, First Judicial District, Second Division, purportedly dismissing two appeals taken as a matter of right to the latter court from the Circuit Court of Cook County, Illinois, for a purported want of prosecution, after that division had granted a motion by Petitioners And Use Petitioners To Disqualify Itself From Sitting On The Case By Reason Of Its Obvious Prejudice Against Them In Favor Of The Late WILLIAM J. O'BRIEN, JR., And The Case Had Been Assigned To Another Division, And It Had Been Assigned To The Second Division By The Executive Committee Of The Court, And Accepted By The Second Di-

vision, Over Their Protest That It Deprived Them Of Their Property And Procedural Rights To Have Their Case Heard By An Impartial, Without Due Process Of Law, And Denying To Them The Protection And Equal Protection Of The Laws, in violation of Their Federal Rights Under The 14th Amendment, Section 1, Appeal From The Appellate Court To The Supreme Court Of Illinois Under Article VI, Section 4(c) Of The Constitution Of Illinois, And Rule 317, Of The Rules Of The Supreme Court Of Illinois, By Petition For Appeal As A Matter Of Right If A Question Under The Constitution Of The United States Or Of The State Of Illinois Arises For The First Time In And As A Result Of The Action Of The Appellate Court, deprived Them Of Their Property And Procedural Rights Without Due Process Of Law, And Denied To Them The Protection And Equal Protection Of The Laws, In Violation Of Their Federal Rights Under The 14th Amendment, Section 1, To The Constitution Of The United States. 25

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

THEMIS N. ANASTOS and HUGH M. MATCHETT, Petitioners herein, and WILLIAM V. DEMAIO and M.J.D.M. TRUCK RENTALS, INC., a Pennsylvania corporation, Use Petitioners herein, petition the Court for a writ of certiorari to the Supreme Court of Illinois, to review a judgment of that Court entered September 29th, 1976, denying their petition for appeal as a matter of right from a purported judgment of the Appellate Court of Illinois, First Judicial District, Second Division, purportedly entered on June 21st, 1976, purportedly dismissing their joint appeal from a judgment dismissing a third party action by the Use Petitioners against one WILLIAM J. O'BRIEN, JR., for a purported want of prosecution in the Appellate Court.

THEMIS N. ANASTOS and HUGH M. MATCHETT, Petitioners herein, further petition the Court for a writ of certiorari to the Supreme Court of Illinois, to review said judgment of that Court entered September 29th, 1976, denying their separate petition for appeal as a matter of right from the said purported judgment purportedly dismissing their appeal from a monetary and declaratory judgment in their favor against WILLIAM V. DEMAIO and M.J.D.M. TRUCK RENTALS INC., a Pennsylvania corporation, with a declaratory judgment against one WILLIAM J. O'BRIEN, JR., which they deem inadequate in amount, for a purported want of prosecute in the Appellate Court.

THEMIS N. ANASTOS and HUGH M. MATCHETT, Petitioners herein, further petition the Court for a writ of certiorari to the Supreme Court of Illinois, to review an order of that Court entered

September 29th, 1976, denying their petition suggesting to the Court the death of WILLIAM J. O'BRIEN, JR., on April 8th, 1976, and the appointment of his widow, EILEEN M. O'BRIEN, as Executrix of the Estate of WILLIAM J. O'BRIEN, JR., Deceased, by the Circuit Court of Cook County, Illinois, Probate Division, on or about May 26th, 1976, File No. 76P 3456, Docjet 817, Page 239, with Bradley Bradley Lyon & Nedderman, 29 S. La Salle Street, Chixago, Illinois 60603, as attorneys for the Estate, and praying that she in her representative capacity be substituted for the late WILLIAM J. O'BRIEN, JR., as a party respondent to their petition for appeal as a matter of right, or, in the alternative for leave to appeal, and that the Clerk be directed to issue summons against her in that capacity for service forthwith.

JURISDICTION

The date of the judgments and order sought to be reviewed is September 29th, 1976.

The jurisdiction of this Court is invoked under Title 28, Section 1257(3) of the United States Code.

QUESTION PRESENTED FOR REVIEW

Whether the State of Illinois, by the action of the Supreme Court of Illinois in denying a petition for appeal as a matter of right from a purported judgment of the Appellate Court of Illinois, First Judicial District, Second Division, purportedly dismissing two appeals taken as a matter of right to the latter court from the Circuit Court of Cook County, Illinois, for a purported want of prosecution, after that division had granted a

motion by Petitioners and Use-Petitioners to disqualify itself from sitting on the case by reason of its obvious prejudice against them in favor of the late WILLIAM J. O'BRIEN, JR., and the case had been assigned to another division, and it had been reassigned to the Second Division by the Executive Committee of the Court, and accepted by the Second Division, over their protest that it deprived them of their property and procedural right to have their case heard by an impartial tribunal, without due process of law, and denying to them the protection and equal protection of the laws, in violation of their Federal rights under the 14th Amendment, Section 1, appeal lying from the Appellate Court to the Supreme Court under Article VI, Section 4(c) of the Constitution of Illinois, and Rule 317 of the Rules of the the Supreme Court of Illinois, by petition

for appeal as a matter of right if a question under the Constitution of the United States or of the State of Illinois arises for the first time in and as a result of the action of the Appellate Court, deprive them of their property and procedural rights without due process of law, and deny to them the protection and equal protection of the laws, in violation of their Federal rights under the 14th Amendment, Section 1, to the Constitution of the United States.

ILLINOIS CONSTITUTIONAL PROVISION AND RULES OF THE SUPREME COURT OF THE STATE OF ILLINOIS INVOLVED

Article VI, Section 4(c) Of The Constitution of the State of Illinois provides:

> "Appeals from the Appellate Court to the Supreme Court are a matter of right if a question under the Constitution of the United States or of this State arises for the first time in and as a result

> of the action of the Appellate Court * * * ."

Rule 317 of the Rules of the Supreme Court of Illinois provides:

> "Appeals from the Appellate Court shall lie to the Supreme Court as a matter of right in cases in which a question under the constitution of the United States or of this state arises for the first time in and as a result of the action of the Appellate Court. The appeal shall be instituted by filing a petition in the form prescribed by rule 315, except that the petition shall be entitled 'Petition for Appeal as a Matter of Right,' item (1) of the petition shall state that the appeal is taken as a matter of right, and item (5) shall contain argument as to why appeal to the Supreme Court lies as a matter of right. In other respects the procedure is governed by rule 315. If leave to appeal is to be sought in the alternative, the request therefor must be included in the same petition, and item (1) thereof shall include an alternative prayer for leave to appeal, and item (5) the argument as to why in the alternative leave to appeal should be allowed as a matter of sound judicial discretion. When both appeal as a matter of right and leave to appeal are sought, both requests will be disposed of by a single order. If the court allows the petition, excerpts from record or an abstract and

briefs shall be filed as provided in the case of appeal by leave under rule 315."

The Committee Comments states:

"This rule provides, in the language of the constitution (Art. VI, §4(c), for appeals as of right from the Appellate Court in cases in which 'a question under the constitution of the United States or of this state arises for the first time in and as a result of the action of the Appellate Court.' The procedure in such cases will be similar to that provided in rule 315 for petitions for leave to appeal, except that the petition need only contain argument as to why appeal lies to the Supreme Court as a matter of right. Prior to the adoption of this rule effective January 1, 1967, such appeals were taken by notice of appeal. (See former Rule 32(3).) The experience of the Supreme Court was that this procedure was often invoked improperly, a fact which the court would not usually discover until full briefs on the merits were filed and the case was scheduled for oral argument. The time of counsel and of the court is saved by giving the court an opportunity to determine this preliminary question on the basis of a petition filed in advance.

"This rule was amended in June 1970, (a) to make mandatory the provision that if leave to appeal is to be sought in the alternative to appeal as of right, the requests for both alternatives are to appear in the same petition, and (b) to provide expressly that if there are requests for both an appeal as of right and an appeal by leave, the court will dispose of both requests by a single order."

In People ex rel Waite v Bristow, 1945, 391 Ill 101, the Court held: "The intention of the court can only be determined from the order entered. The action of the court can only be shown by its records."

Section 54(2) of the Illinois Civil Practice Act, Chapter 110, Illinois Revised Statutes 1975, provides:

"Death. If a party to an action dies and the action is one which survives, the proper party or parties may be substituted by order of court upon motion. If a motion to substitute is not filed within 90 days after the death is suggested of record, the action may be dismissed as to the deceased party.

If the death of a party to a personal action is suggested of record and no petition for letters

of office for his estate has been filed, the court, upon motion and after such notice to the party's heirs, legatees or devisees as the court directs, and without opening of an estate, may appoint a special administrator for the deceased party for the purpose of prosecuting or defending the action. If a legal representative is appointed for the estate before judgment is entered, and his appointment is suggested of record in the action, the court shall order that he be substituted for the special administrator.

* * * "

STATEMENT OF THE CASE

On March 31st, 1976, two separate appeals from two different judgments entered in Circuit Court of Cook County, Illinois, Case No. 68L 13088, were pending in the Appellate Court of Illinois, First Judicial Circuit, Second Division, at Case No. 61769 and Case No. 62806, under Case No. 61769.

On March 31st, 1976, Petitioners and Use-Petitioners moved the Court for

an extension of time in which to file their briefs from April 5th, 1976, to and including May 17th, 1976, by reason of the fact that litigation directly connected with this litigation was still pending in the Supreme Court of the United States on petition for rehearing of a petition for writ of certiorari, and in the United States District Court for the Northern District of Illinois, Eastern Division, and in the Circuit Court of Cook County, Illinois, making it inadvisable for them to proceed with the appeal pending further action by those courts, but stating that "it was expected that the case may be ripe to proceed by May 17th, 1976." No objection was made by any litigant. It was allowed to April 18th, 1976.

WILLIAM J. O'BRIEN, JR., the appellee in the first appeal, and an appellee on the second appeal, died on April

8th, 1976. Petitioners' attorney heard a rumour that he was dead, and telephoned his attorneys and ascertained that he was, and that his estate would be probated, and that his widow would be his executrix. On May 3rd, 1976, she filed a petition for letters of administration in the probate section of the Circuit Court of Cook County, Illinois. On May 26th, 1976, the widow was granted letters of administration as Executrix. On June 10th, 1976, Mr. MATCHETT had a telephone conversation with one of her attorneys, and ascertained letters had been granted. On June 11th, 1976, he started work on motions for leave to have summons issued against her, and to have her substituted for her husband, in her representative capacity. On June 19th, 1976, he served notice of his motion in the DISTRICT court. On June 21st, 1976, he served notice of

his motion in the Appellate Court for June 22nd, 1976. On June 22nd, 1976, he served notice of his motion for June 29th, 1976, in the Circuit Court.

On June 24th, 1976, at 5:00 P.M. he noticed in the Chicago Law Bulletin for that date that the Appellate Court had dismissed the appeals that day for want of prosecution. He immediately typed a motion to vacate on the ground there had been no want of prosecution, served notice, and filed his motion and notice the next morning before 0900. On the morning of June 25th, he received a copy of the purported order signed by the Honorable JOHN J. STAMOS, Presiding Justice, dated June 21st, 1976, that had, apparently, been promulgated on June 24th, 1976. The Circuit and District court allowed his motions. On June 29th, 1976, the Appellate Court in an order signed by three judges,

denied the motion to vacate. The Court completely ignored his motion filed in that Court on June 22nd, 1976. It had not only suggested the death of Mr. O'BRIEN, and asked that his widow be substituted as a party defendant in her capacity as Executrix of his Estate, but had also prayed for an extension of time to 35 days after she filed her appearance. On July 8th, 1976, he filed a motion to vacate the orders of June 21st, 1976, promulgated June 24th, 1976, and the order of June 29th, 1976, and prayed the relief prayed in the motion of June 22nd, 1976. They again renewed their motion, hereinafter stated, for the Second Division to disqualify itself on the ground of prejudice against them and DEMAIO and MJDM in favor of O'BRIEN and Mrs. O'BRIEN.

They challenged the orders on the ground there had been no want of prosecution; that the order of June 21st, 1976, is a void order because it is

only signed by one judge when the Constitution of Illinois provides for the concurrence of two judges in any decision; that the order of June 29th, 1976, although signed by three judges, is a void order because it denies a motion to vacate a void order, and was a deprivation of property and procedural rights by the State of Illinois without due process of all, and a denial of the protection and equal protection of the laws, in violation of the State constitution, and the 14th Amendment, Section 1. They went on to claim that the order of June 21st, 1976, and the order of June 29th, 1976, are void orders because they are signed by judges who have previously disqualified themselves on the ground of prejudice against them in favor of O'BRIEN, and under the law no judge who has once disqualified himself sitting in a case can sit over the objection of the parties praying disqualification. They also contended that under Section

54(2) of the Civil Practice Act, on the death of a party where the action is one which survives, the action is suspended until the proper party is substituted by order of Court within 90 days after the death is suggested of record, and the proper person to be served with summons is the personal representative, the motion of June 22nd, 1976, having been made in compliance with the statute. They asserted that as a result of the conduct of the Appellate Court to July 8th, 1976, Petitioners and Use-Petitioners had been deprived of their property and procedural rights by the State of Illinois, and of the protection and equal protection of the laws, and of a remedy by appeal, in violation of the Constitution of Illinois and the 14th Amendment, Section 1, to the Constitution of the United States. The motion was filed on July 8th, 1976, and denied by an order signed by three judges.

The following questions arising under the State and Federal constitutions arising in and as the result of the action of the Illinois Appellate Court, First District, had previously been raised by Petitioners in the Appellate Court and decided adversly to them by that Court as follows:

On June 23rd, 1975, Petitioners and the Use-Petitioners filed a petition in Case No. 61769, for the Second Division, to whom the case had been assigned, to disqualify itself or be disqualified from hearing that appeal, and any other appeal that might thereafter be taken from any order or judgment in Circuit Court of Cook County, Illinois, Case No. 68L 13088, on the ground of the obvious prejudice against them in favor of O'BRIEN evident in its opinion and judgment in that case, reported as 3 Ill App 3rd 1014, a copy

of which was attached to the petition, and incorporated by reference. On July 1st, 1975, the Second Division allowed the motion to disqualify itself and transferred the cause to the Executive Committee of the Appellate Court, First District, for reassignment. On July 28th, 1975, the Executive Committee reassigned the cause to the Third Division. On August 26th, 1975, the Executive Committee vacated its order of July 28th, 1975, and reassigned the cause to the Second Division, without any notice to Petitioners, without revealing who or what had instigated it taking such action. On August 28th, 1975, the Second Division vacated its order of July 1st, 1975, and reinstated the cause on its calendar, and sent the attorney for Petitioners and Use-Petitioners that their motion for a stay of mandate pending action by the Supreme Court of Illinois on a petition to be filed under Rule 302 of the

Rules of the Supreme Court of Illinois for that case to be reviewed by the Supreme Court, eventually filed in the Supreme Court of Illinois as Case No. 47942 but denied by that Court, and that their time for filing briefs be extended to October 3rd, 1975.

On September 19th, 1975, Petitioners filed a motion before the Executive Committee and the Second Division for the Executive Committee to vacate its order revoking its order assiging the case to the Third Division and reassigning the case to the Second Division, for all the grounds stated in the previous motion, and on the grounds thereinafter stated, which may be summarized to be a denial to them of a hearing before an impartial tribunal by the State of Illinois, and a deprivation of their right to such a hearing by the State of Illinois, in vio-

lation of their Federal right to such a hearing as a matter of due process of law, and a denial to them of their Federal right to such a hearing as a matter of the protection and equal protection of the laws of Illinois and of the Constitution of the United States, and, as a result, a violation of their Federal rights by the State of Illinois under the 14th Amendment, Section 1, to the Constitution of the United States. On September 24th, 1975, the Chairman, Executive Committee, entered an order denying the motion filed September 19th, 1975.

On October 3rd, 1975, Petitioners and Use-Petitioners filed a motion for the Executive Committee to vacate the order of September 24th, 1975, as a void order, and if denied, for the Court sitting in banc to do so. They stated that their motion was, in brief, to protest

against the abuse and failure of judicial power in violation of the Constitution of Illinois and the 14th Amendment, Section 1. On October 14th, 1975, the Chairman of the Executive Committee, in an order only signed by him, stated that:

> The Executive Committee of this Court, all members being present, and having duly considered the motion of THEMIS N. ANASTOS and HUGH M. MATCHETT, Plaintiffs-Appellants, and WILLIAM V. DEMAIO and M.J.D,M. TRUCK RENTALS, INC., a Pennsylvania corporation, moving the Executive Committee to vacate its order of August 26th, 1975, and for a hearing by a majority of the members sitting in banc, and for other relief, said motions by a unanimous vote of the Executive Committee, are hereby denied."

On October 27th, 1975, Petitioners and Use-Petitioners filed a motion addressed to the Court in Banc, to overrule the Executive Committee, etc.. On October 31st, 1975, the Clerk of the Court returned the motion and notice and twenty copies stamped filed October

October 27th, 1975, with a covering letter that he had been instructed by the Court to advise Mr. MATCHETT that the Court had no jurisdiction to sit in banc.

In their Petition for Appeal as a Matter of Right Petitioners claimed that the action of the "Court", and the action of the Clerk, are a denial of due process of law and the equal protection of the laws by the State of Illinois, and an appeal, and of a remedy for a judicial wrong by an appeal, in violation of the Constitution of Illinois, and of the 14th Amendment, Section 1, to the Constitution of the United States, without regard to the correctness of the proposition that the Appellate Court has no jurisdiction to sit in banc to determine an administrative duty, because the Court failed to render a judicial

decision, and has failed to make a record, upon which its action can be reviewed. They concluded that it was obvious that Petitioners and Use Petitioners could not get a fair hearing in the Appellate Court of Illinois, First Judicial District.

Petitioners and Use Petitioners filed a timely Petition for Appeal as a Matter Of Right from the purported order of the Appellate Court purportedly dismissing their appeals for a purported want of prosecution, where there was no want of prosecution due to the death of Mr. O'BRIEN, in a case in which the Third Division had granted a motion to disqualify itself on the ground of prejudice against Petitioners and Use Petitioners in favor of O'BRIEN, covering all the questions arising under the Constitution of Illinois and under the Constitution of the United States that

arose for the first time in the Appellate Court, above specified, including the one on which the jurisdiction of this Court is predicated.

The Supreme Court of Illinois advised Petitioners and Use Petitioners that it denied their petition for leave to appear. It made no mention of their petition for appeal as a matter of right.

Petitioners and Use Petitioners assume that the Supreme Court of Illinois under its Rules, did pass on the petition as a matter of right, and erroneously decided that none of the constitutional issues that arose for the first time had any merit. Otherwise, the Supreme Court of Illinois, automatically deprived them of their property and procedural rights without due process of law, and denied to them the protection and equal protection of the laws, in violation of their Federal

right under the 14th Amendment, Section 1. In either event, the Petition should be granted.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The State of Illinois has deprived Petitioners and Use-Petitioners of their property and procedural rights without due process of law, and has denied them the equal protection of the laws, in violation of their Federal rights under the 14th Amendment, Section 1, to the Constitution of the United States by the actions of the Illinois Appellate Court, First District, specified in the Statement Of The Case, and in the Federal Question, on which the jurisdiction of this Court is predicated, and the action of the Supreme Court of Illinois in either ignoring the issues or in erroneously

holding that Petitioners' and Use-Petitioners' Federal constitutional rights had not been violated by a Court that had granted a motion to disqualify itself from sitting on any appeal in the case by reason of its prejudice against certain litigants in favor of other litigants insisting on sitting on the case and dismissing an appeal for a purported want of prosecution, when Petitioners and Use Petitioners acted in accordance with the law of the State of Illinois in petitioning for substitution of a deceased defendant by the executrix of the estate.

CONCLUSION

For the reasons submitted, it is prayed that this petition for a writ of certiorari to the Supreme Court of Illinois be granted, and the judgments

of the Supreme Court of Illinois, and the Illinois Appellate Court, First District, Third Division, and Executive Committee, be reversed with directions.

Respectfully submitted,

HUGH M. MATCHETT
Attorney For Petitioners